



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eagle Design and Management, Inc.

File: B-239833; B-239833.2; B-239833.3

Date: September 28, 1990

Gary G. Stevens, Esq., Bogle and Gates, for the protester.
Ellen F. Randel, Esq., Watt, Tieder, Killian & Hoffar, for
Caliber Associates, Inc., an interested party.
James F. Trickett, Department of Health and Human Services,
for the agency.
Scott H. Riback, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Where Small Business Administration (SBA) regional office, pursuant to a timely post-award size protest, has determined awardee to be a large business, and both awardee and agency have appealed the determination to the SBA Office of Hearings and Appeals, whose decision is pending, protest that awardee's contract should be terminated because awardee is other than small is premature.
2. Agency engaged in adequate discussions with protester where agency's discussion questions should reasonably have led protester into areas of its proposal requiring strengthening.
3. Agency error in distributing partially misprinted evaluation scheme with request for proposals (RFP) is not prejudicial where all competitive range offerors received identical copies of the RFP, omitted subfactors were reasonably subsumed under evaluation criterion, and relative standing of offerors was not materially affected.
4. Agency's cost/technical tradeoff is reasonable where, despite cost premium associated with awardee's proposal, awardee submitted clearly superior technical proposal.

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DECISION

Eagle Design and Management, Inc. protests the award of a contract to Caliber Associates, Inc. under request for proposals (RFP) No. 105-90-1800, issued by the Department of Health and Human Services (HHS) for services in connection with the establishment and operation of a national clearinghouse on child abuse and neglect and family violence.^{1/} Eagle argues that the agency made numerous errors in awarding the contract.

We deny the protests.

The RFP was issued as a 100-percent small business set-aside and contemplated the award of a cost-plus-fixed-fee contract for a base year and two 1-year options for the performance of various services in connection with the establishment and operation of the national clearinghouse. The RFP provided that proposals would be evaluated on the basis of technical and cost factors and that cost considerations would be secondary to technical considerations. Award would be made to the offeror submitting the most advantageous proposal. In the technical area, the RFP contained five broad technical criteria and the weight assigned to each of those criteria. Technical proposals would be evaluated based upon: 1) the offeror's understanding of the scope of work (15 points); 2) the adequacy and creativity of the offeror's proposed methodology (30 points); 3) the offeror's qualifications and experience (20 points); 4) the qualifications of the offeror's proposed personnel (20 points); and 5) the adequacy of the offeror's management plan (15 points). The RFP also specified a list of various subfactors under four of the five broad technical factors. In the area of cost, the solicitation specified that proposals would be evaluated for cost realism.

In response to the RFP, HHS received initial proposals from Eagle and Caliber. After evaluation, the agency assigned an initial technical score of 95 to Caliber's proposal and an initial technical score of 80 to Eagle's proposal. On the basis of these scores, the contracting officer determined that both firms were in the competitive range. Subsequently, the agency engaged in discussions with both firms. The agency's discussions with Caliber were directed exclusively to various aspects of the firm's cost proposal because the agency found no technical deficiencies in the

^{1/} Eagle has filed three separate protests which we have consolidated into this decision.

firm's proposal. The agency's discussions with Eagle were directed to both cost and technical issues with the primary focus of the technical discussions being the agency's concerns relating to the firm's understanding, methodology, and personnel qualifications. In addition to the written discussion questions propounded by the agency, a brief session of oral discussions was held. During Eagle's oral discussions, the agency's written questions were modified and narrowed.

Subsequent to discussions, the agency received and evaluated best and final offers (BAFO) from both firms. As a result of this evaluation, the agency raised Eagle's score to 81; Caliber's score remained at 95. On the basis of these scores, the agency decided to award the contract to Caliber as the firm submitting the proposal offering the best overall value to the government. The agency states that it then sent Eagle the pre-award notice required under Federal Acquisition Regulation (FAR) § 15.1001(b)(2) (FAC 84-58) on May 14,^{2/} and made award of the contract on May 18. In addition, the agency provided Eagle with notice of the award as required under FAR § 15.1001(c). On May 25, following a debriefing, Eagle filed its initial letter of protest with our Office. On May 30, the protester filed a small business size protest with the contracting officer. On May 31, the agency executed a "best interest" determination to continue performance of the contract notwithstanding the bid protest. On July 18, the Philadelphia regional office of the Small Business Administration (SBA) issued a size determination which found Caliber to be other than a small business for purposes of this procurement. On July 26, Caliber appealed that determination to the SBA Office of Hearings and Appeals.^{3/} As of the time of this decision, the SBA Office of Hearings and Appeals has not issued a decision on the size appeal.

Eagle argues that the agency failed to provide it with pre-award notice of its intention to award to Caliber and that the contracting officer failed to properly investigate Caliber's small business size status prior to making award. As to the pre-award notice, Eagle alleges that it never received the agency's pre-award notice and that, as a

^{2/} Eagle alleges in its protest that it did not receive the required pre-award notice until it requested a copy of it after award on May 23. The agency has furnished our Office with a copy of the notice dated May 14.

^{3/} The agency has also appealed the Philadelphia Regional Office's determination.

result, the firm was precluded from filing a pre-award size protest with the agency. Concerning Caliber's self-certification as a small business and the agency's investigation of Caliber's size status, Eagle argues that Caliber has improperly subcontracted more than 50 percent of the subject contract's requirements to a large business, The Circle, Inc., and that the contracting officer failed to adequately investigate Caliber's compliance with the "50 percent rule" prior to awarding the contract.^{4/}

As a general rule, agencies are required to provide unsuccessful offerors with pre-award notice of the apparent successful offeror in a small business set-aside in order to provide the unsuccessful offerors an opportunity to file a timely size protest. See FAR § 15.1001(b)(2). (The FAR provides that a size protest must be received within 5 business days after the contractor's receipt of the notice provided under FAR § 15.1001(b)(2) in order to be timely and applicable to the procurement, provided that no award has been made prior to the receipt of the size protest. See FAR § 19.302(a) and (j) (FAC 84-56)). An agency's failure to provide the notice can result in an improper award if the awardee is ultimately determined to be other than small. See Science Sys. and Applications, Inc., B-236477, Dec. 15, 1989, 89-2 CPD ¶ 558.

Here, however, we do not find the award to Caliber improper. First, there is no evidence in the record to show that HHS failed to mail the required pre-award notice to Eagle. HHS has furnished our Office a copy of the pre-award notice addressed to the protester, dated May 14, and states that it was timely mailed. Second, the agency waited the requisite 5 business days before making the award to Caliber. Third, our examination of the record shows that the agency did in fact give careful consideration to the question of whether Caliber met the 50 percent rule prior to making its award. In this respect, the agency's post-negotiation memorandum discusses at length the division of labor as well as costs between Caliber and its subcontractor. Therefore, there is

^{4/} To be eligible for award of this contract as a small business, the contractor had to agree to incur labor costs for its own employees which amount to at least 50 percent of all labor costs required for contract performance.

no basis to conclude that the agency failed to adequately investigate the matter.^{5/}

The protester argues that Caliber's contract should be terminated because the firm was found to be other than small by the SBA regional office.

The regional office ruled in response to the protester's post-award size protest.^{6/} FAR § 19.302(j) treats size status protests received after award of a contract as having no applicability to that contract. However, under new SBA regulations, a size protest, received within 5 days of the protester's receipt from the contracting officer of notification of the identity of the awardee is timely and applies to the procurement in question even where the size protest is received after award. See 13 C.F.R. § 121.1603 (1990). Therefore, an agency should consider terminating an award for convenience if the contractor is found to be a large business pursuant to a timely post-award size protest. See American Mobilphone Paging, Inc., B-238027, Apr. 5, 1990, 69 Comp. Gen. ___, 90-1 CPD ¶ 366. Here, both Caliber and the agency have appealed the SBA regional office determination that Caliber was large, and a decision by the SBA Office of Hearings and Appeals is expected shortly. Under the circumstances, we think it is premature to decide whether the agency has unreasonably determined not to terminate Caliber's contract for the base year and/or the two option periods.

Eagle next argues that the agency failed to conduct meaningful discussions with it and that, as a result, the firm was not provided a fair opportunity to sufficiently revise its BAFO. The protester argues that it was only provided discussion questions under three of the five evaluation criteria even though the agency identified weaknesses in the firm's proposal under all five criteria.

^{5/} We note as well that the basis of Caliber's current size appeal is that the SBA regional office erroneously considered the firm's initial offer rather than its BAFO in determining its compliance with the 50 percent rule. The agency has also appealed on this basis.

^{6/} Eagle points out that the contracting officer waited almost 3 weeks before sending the size protest to the SBA regional office. While we agree that the contracting officer erred in failing to promptly forward Eagle's size protest to the SBA, we are aware of no legal requirement that an agency suspend contract performance in the face of a post-award size protest.

Eagle also argues that the agency's "narrowing" of the written discussion questions during oral discussions served to further mislead it into believing that its proposal was otherwise acceptable.

The agency responds that it provided Eagle with sufficiently explicit discussion questions to lead it into the areas of its proposal where weaknesses were found. The agency also states that the purpose of narrowing the discussion questions during face-to-face negotiations was to provide the protester with a meaningful opportunity to improve its proposal within the relatively short period of time that the protester was given in which to submit its proposal revisions. In this latter regard, the agency states that the questions were narrowed in order to elicit a response from the protester which would demonstrate in a representative manner its understanding of the requirements rather than eliciting an in-depth comprehensive response.

In order for discussions in a negotiated procurement to be meaningful, contracting agencies must furnish information to all offerors in the competitive range as to the areas of their proposals which are believed to be deficient so that offerors may have an opportunity to revise their proposals to satisfy the government's requirements. Pan Am World Servs., Inc. et al., B-231840 et al., Nov. 7, 1988, 88-2 CPD ¶ 446. There is no requirement that agencies conduct all-encompassing discussions; rather, agencies are only required to reasonably lead offerors into those areas of their proposals needing amplification, given the context of the procurement. Eagan, McAllister Assocs., Inc., B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405.

Based on this record, we conclude that the protester was afforded an opportunity to engage in meaningful discussions. The evaluators, after examining Eagle's initial proposal, were basically satisfied as to the firm's capabilities regarding the necessary skills and resources required to properly conduct a clearinghouse operation. They were concerned primarily about Eagle's subject matter expertise and the "depth" of its consultant pool and "on-staff" experts. The firm was therefore asked: 1) to choose any two subjects in the area of child abuse and neglect and family violence and to discuss those issues in its BAFO; and 2) to list six expert consultants who might be used by the

firm in the event that it was awarded the contract.^{7/} After reviewing and evaluating Eagle's responses, the agency evaluators found that Eagle had failed to adequately address their concerns. In the area of subject matter expertise, the evaluators found that, within the topics selected by Eagle for discussion, the firm had failed even to make mention of various significant federal programs dealing with the particular chosen subjects. In the area of consultant and personnel depth, the evaluators found that, while Eagle had provided the required list of names, it had not identified the significance of the individuals in relation to their respective fields.

We conclude that the protester was led into the areas of its proposal needing amplification and that it was the protester's inadequate responses to the discussion questions which resulted in the lower rating of its proposal, rather than the agency's failure to conduct meaningful discussions.

Eagle next argues that the agency erroneously evaluated it on the basis of evaluation criteria not contained in the RFP. In this respect, the protester points out that it received a misprinted copy of the RFP which did not contain a listing of various subfactors under the evaluation criterion for corporate experience. The protester therefore alleges that it was prejudiced because it was not afforded an opportunity to address its proposal to these subfactors and that, in addition, this resulted in a "spill-over" effect which led to deficiencies in its proposal under other evaluation criteria.

The agency admits that copies of the misprinted RFP were distributed to an undetermined number of prospective offerors and that it was unaware of the discrepancy until it prepared its report for our Office. The agency argues, however, that the discrepancy was not prejudicial to the protester since, even were it to have received the maximum possible score under corporate experience, it would not have affected the agency's award decision since the protester's score would only have improved by approximately 1.6 points. The agency also argues that, in any event, the subfactors were reasonably subsumed under the evaluation criterion for corporate experience and that, consequently, the protester was on notice as to what was expected of it. Finally, Caliber, who has filed with our Office as an interested

^{7/} Eagle was asked other questions in addition to these which related to other weaknesses in its proposal. These two areas, however, were the technical panel's areas of primary concern based upon Eagle's initial proposal.

party, states that it also received a misprinted copy of the RFP.

As a general rule, agencies must give sufficient detail in a solicitation in order to allow offerors to intelligently prepare their proposals and compete on a common basis. See, e.g., AAA Eng'g & Drafting, Inc., B-236034, Oct. 31, 1989, 89-2 CPD ¶ 404. Agencies are not, however, required to list all subfactors which may be used for evaluation purposes so long as those subfactors are reasonably related to the RFP's stated evaluation criteria. See Harris Corp., B-235126, Aug. 8, 1989, 89-2 CPD ¶ 113.

In this case, while the agency failed to provide all firms with a properly printed RFP, we nonetheless conclude that the error was not prejudicial to Eagle. First, as noted above, Caliber also apparently received a misprinted copy of the RFP. Accordingly, the competition was conducted on an equal basis. Second, we conclude that the omitted subfactors were reasonably related to the primary evaluation criterion, the offeror's demonstrated corporate experience. In this regard, we note that the subfactors were simply a listing of various aspects of a firm's corporate experience as they related to the establishment and operation of a clearinghouse facility, including database design and management, data processing, analysis and report preparation, program evaluation, computer programming, and library and information services. Third, there is no evidence of a "spill-over" effect which would have materially altered the standing of the offerors. Under the circumstances, therefore, we have no basis to sustain this ground of Eagle's protest.


Finally, the protester argues that the agency made an improper cost/technical tradeoff in its selection of Caliber. In this respect, Eagle argues that Caliber offered a price which was approximately 30 percent higher than its price and that, given the closeness of the firm's technical scores, the agency cannot justify the additional cost premium associated with award to Caliber.

The agency responds that it reasonably elected to pay the cost premium associated with Caliber's proposal in light of the firm's clear technical superiority. In this regard, the agency notes that Caliber's clearinghouse capabilities were highly rated, and its personnel and consultants possess technical and subject matter expertise which rendered the firm's proposal superior.

In reviewing an agency's selection decision, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. See Unisys Corp., B-232634, Jan. 25, 1989, 89-1 CPD ¶ 75. Award can be made to a higher-rated, higher-cost offeror where the decision is rationally based and consistent with the evaluation criteria set forth in the solicitation. See System & Processing Eng'g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441.

We have reviewed the proposals, the BAFOs, the agency's evaluation, and its cost/technical tradeoff, and conclude that the agency's decision was rationally based and in accordance with the stated evaluation criteria. Specifically, we point out that the agency found Caliber's initial proposal technically acceptable in every respect. We find no basis to question the agency's technical scoring of the Caliber proposal or the agency evaluators' narrative evaluation statements which are supported by an examination of Caliber's proposal. Also, while the firm's price was higher than the price offered by Eagle, the firm's price was nonetheless lower than the government's independent cost estimate. Finally, Eagle has presented no evidence to our Office which would demonstrate that the agency's source selection was not rationally based and in accordance with the stated evaluation criteria, which gave greater weight to technical than to cost.

We deny the protests.


for James F. Hinchman
General Counsel